



Redistricting: Legal Issues

Montgomery County Redistricting Commission
March 31, 2011



Procedural Matters

- County Charter Section 104: Timeline for Redistricting Procedure: plan and report to Council by November 15; public hearing within 30 days; law after 90 days if Council does not take action.
- County Code Section 2-149: Meetings may be conducted informally but to take “formal action or decide controversial matters,” Roberts Rules of Order govern.
- County Code Section 2-149: Meetings open to public in accordance with Open Meetings Act
 - Notice requirements
 - Rules regarding conduct of public in attendance
 - Closure of meeting to preserve attorney-client privilege

Redistricting: Laws Governing



1. County Charter and Traditional Districting Criteria

2. Federal laws

A. Equal Protection Clause of 14th Amendment to U.S. Constitution

1) Equal Population

2) Racial Gerrymandering

3) Political Gerrymandering

B. 15th Amendment to U.S. Constitution and Section 2 of the Voting Rights Act of 1965

County Charter



- Section 102: County Council Composition and Election:
 - Nine council members, 4 at large; 5 from districts, must reside in district they represent.
- 103: Council Districts:
 - Each of the five districts “shall be **compact in form** and be **composed of adjoining territory**. Populations of the council districts shall be **substantially equal**.”



Traditional Districting Criteria

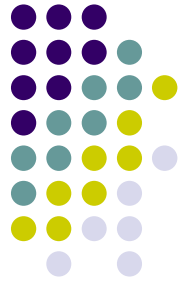
- The Supreme Court Recognizes These Traditional Districting Criteria:
 - Respect for political subdivisions
 - Preservation of communities of interest
 - Incumbency protection
 - Geography
 - Compactness
 - Contiguity

County Charter: Compact, Contiguous, Equal Population



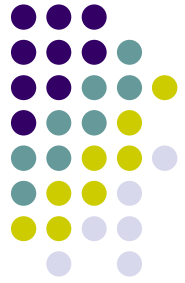
- Compact requirement: close union of territory is key
- Contiguity (“composed of adjoining territory”): territory touching, adjoining, and connected
- Equal Population – Will ultimately be judged by 14th Amendment Equal Protection Standards

Cases: Charter and Traditional Districting Criteria of Compactness and Contiguity



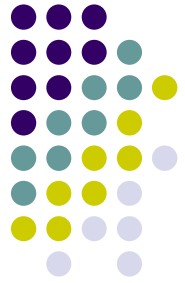
- 1982 Maryland Court of Appeals: Rejected multiple challenges to the 1982 Maryland Legislative Redistricting Plan. (299 Md. 658)
 - Purpose of compact and contiguous districts is to prevent political gerrymandering.
 - Compactness is a relative standard: does not require equidistance from the center or mathematical precision
 - Many factors make some degree of non-compactness unavoidable (geography, contiguity, population equality).
 - Correct test: affirmative showing that districts were drawn to dilute or enhance voting strength.
- *Ajamian v. Montgomery County*, 99 Md. App. 665 (1994). Court rejected challenge that Montgomery County Council District plan was not sufficiently compact because one district was much larger geographically than others. The population deviation was within the acceptable 10% deviation, so the greater geographical area did not affect voting strength.

14th Amendment Equal Protection Clause: Mandates Equal Population Between Districts



- Population between districts must be equal – “one person, one vote”
- Judged by maximum population deviation:
 - Add percentage variation between largest and smallest district in comparison to ideal district.
 - Less than 10% deviation, “*de minimis*,” will not itself support vote dilution claim.
 - Over 10% deviation, presumptively invalid: burden shifts to government to show substantial justification for the deviation.
 - 16.4% deviation is close to having no possible justification under the Equal Protection Clause.

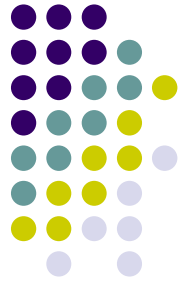
Case: 14th Amendment – Equal Protection Clause Equal Population and “One Person, One Vote”



Reynolds v. Sims, 377 U.S. 533 (1964)

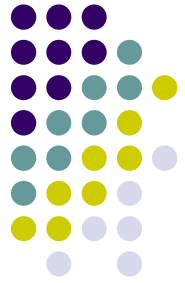
- Equal protection clause applies to state legislative districts to ensure equality of votes.
- Equality of votes demands that districts must be population-based; apportioning in Alabama State legislature was on County-basis and districting had not occurred in over 60 years, population changes not reflected in representation.

14th Amendment Equal Protection Clause: Prohibits Racial Discrimination in Districting



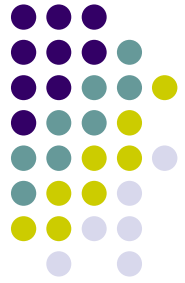
- Prohibits intentional discrimination on the basis of race.
- Race may be *a* factor, but not the *predominant* factor: government cannot subordinate traditional districting criteria to race absent a “compelling government interest” and the plan must be narrowly tailored, using the least restrictive alternative, to meet that interest.
 - Race-based motive may be shown / strict scrutiny triggered:
 - Through direct evidence, if evidence shows race was intentionally used to draw lines; or
 - Circumstantial evidence, where a districting plan is so irregular it can only be viewed as an effort to segregate on the basis of race.

Case: 14th Amendment – Equal Protection Clause – Racial Gerrymandering: District Shape Triggered Strict Scrutiny



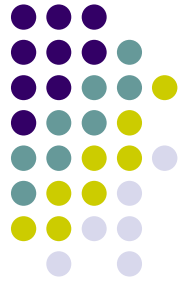
- North Carolina’s “bug splattered on a windshield” / “Rorschach ink-blot test” and “snakelike” districts: ***Shaw v. Reno*, 509 US 630 (1993)**.
 - One district: “moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southernmost part of the State” – was compared to “a Rorschach ink blot test” and “a bug splattered on a windshield”
 - Second district: 160 miles long and for much of its length no wider than an interstate corridor, winding “in snakelike fashion through tobacco country, financial centers, and manufacturing until it gobbles in enough enclaves of black neighborhoods.”
 - Voters stated a claim for relief under the equal protection clause where state deliberately segregated voters on the basis of race.
 - Note these districts were created in an attempt to create majority-minority districts; court withheld judgment in this case on whether that Section 2 compliance was a compelling state interest.

14th Amendment Equal Protection Clause: Compliance with Section 2 of Voting Rights Act (District Lines Drawn Using Race) as Compelling Government Interest



- Compliance with Section 2 the Voting Rights Act is a compelling government interest (permitting race as predominant factor), but government must have strong evidence of liability under Section 2 of the Voting Rights Act.
- Even then, race may not be a predominant factor **substantially more than is reasonably necessary to avoid liability under Section 2.**
- To be “narrowly tailored” to comply with Section 2, government must be able to show how plan as drawn remedied non-compliance with Section 2.

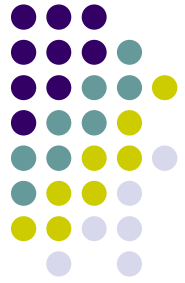
Case: 14th Amendment – Equal Protection Clause – Racial Gerrymandering: District shape triggering strict scrutiny, lines not narrowly tailored to meet CGI



The Texas “sacred Mayan Bird” and “jigsaw puzzle” districts:
***Bush v. Vera*, 517 U.S. 952 (1996)**

- One of the stated goals was to create a “majority-minority” district to comply with Voting Rights Act. Other motives were present, but race was predominant enough to warrant strict scrutiny.
- Districts violated the Equal Protection Clause because they were not narrowly tailored to comply with Section 2 of the Voting Rights Act – district was so irregularly shaped, minority group could not establish they were compact, one of the preconditions to protection under Section 2.

Compactness – Not Mandated But Used As a Factor In Federal Claims



- Compactness is not mandated by the U.S. Constitution but it is a factor that is reviewed differently in VRA and Equal Protection claims.
- VRA: Section 2 requires a court to review whether the minority population is in a geographically compact area; not a review of the district lines.
- Equal Protection: compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines.

Perry, 548 U.S. 399 (2006)

14th Amendment Equal Protection Clause: Political Gerrymandering

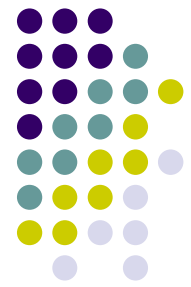


- Political gerrymandering may be so extreme as to give rise to a claim that one party's votes did not receive equal weight in the election.
- Plaintiff must show
 - 1) intentional discrimination on the basis of party, and
 - 2) disadvantage or actual discriminatory effect to the plaintiff party (effectively shut out of political process).

Case: 14th Amendment Equal Protection Clause – Political Gerrymander



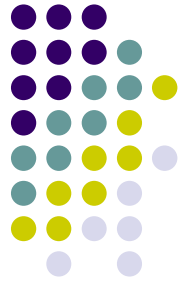
- ***Ajamian v. Montgomery County*, 99 Md. App. 665 (1994) :**
 - Montgomery county Council district plan drawn so that two minority party incumbents were now in the same district and one district was left without a council member.
 - All majority party incumbents were protected.
 - Court applied the analysis from the Supreme Court's plurality decision of *Davis v. Bandemer*: discrimination against a group and discriminatory effect upon the group.
 - Court found no unconstitutional gerrymander: Plaintiffs could not prove that there was a discriminatory effect upon republicans since not even one election had taken place.



Cases: Fourteenth Amendment Equal Protection Clause: Political Gerrymander

- ***Vieth v. Jubelirer*, 541 U.S. 267 (2004) –Pennsylvania congressional district “loom[ed] like a dragon descending upon Philadelphia from the West.”**
 - Plaintiffs argued that partisanship alone was the rationale behind the plan and traditional districting principles were ignored (Counties and towns were split up).
 - Court refused to consider whether it was a political gerrymander, finding no judicially enforceable limit on political considerations that States and Congress can take into account when districting.
 - Plurality opinion.
- ***League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)**
 - The Court rejected the argument that Texas congressional redistricting that occurred mid-decade was in and of itself a sign of partisan gerrymandering.
 - No “one person, one vote” violation found: population variances between districts were within acceptable norm. (Note that there party representation in Congress did change as a result of this plan, but evidence showed it was consistent with change in party presence in population.)
 - Plurality opinion.

15th Amendment and Section 2 of the Voting Rights Act



- 15th Amendment – “The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude.”
- Voting Rights Act of 1965 – Enacted to enforce the 15th Amendment in 1965 after it became clear that districting was being used as a tool to weaken the voice of minorities in elections.
- Section 2 (42 U.S.C. § 1973) – Districting plan cannot have the purpose or effect of abridging right to vote on the basis of race.
 - Section 5 (42 U.S.C. . § 1973c) – Not an issue for the County; requires some jurisdictions to obtain federal approval before altering districting plans.



Voting Rights Act – Section 2 Claim

- When will a redistricting plan subject to challenge under Section 2?
- If a plaintiff can show the effect of the plan impedes the equal opportunity of minority voters to elect candidates of their choice.
- Note that intent is not a consideration.
- The Supreme Court’s test: 3 preconditions and “totality of the circumstances”



Voting Rights Act – Section 2 Claim

- Three preconditions to a successful Section 2 claim by a minority group – plaintiff must show:
 1. Minority group is large and compact enough to constitute a majority in the district;
 2. Minority group is politically cohesive; and
 3. White majority votes as a bloc to defeat minority's preferred candidate
- Plaintiff must then show under the “totality of the circumstances,” that the plan results in an electoral system not equally open to participation by members of plaintiff's class.



Voting Rights Act – Section 2 Claim

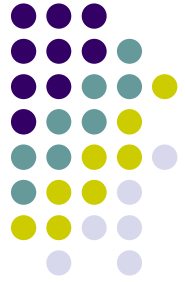
- “Totality of the circumstances”: Many factors reviewed. No requirement that any particular number of factors be proved; some may be more relevant than others.
- Key factors identified by the Court:
 - Extent of racially polarized voting.
 - The extent to which members of the minority group have been elected to public office.
 - Proportionality: is the minority group’s elected representation proportionate to their presence in the population?



Terminology

- “Majority minority” – Minority group composes a majority of the population
- “Vote Dilution” – weakening strength of a group’s vote through methods such as:
 - “Packing” – concentrating group into district so they are excessive majority.
 - “Cracking” – dispersing group into districts in which they are an ineffective minority.
- “Influence district” – minorities have enough political heft to exert influence in an election, but not enough to win.
- “Coalition district” or “Crossover district” – minorities can elect candidate of their choice with the support of crossover majority voters.

Case: Voting Rights Act – Section 2 Violation Found



- *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022 (1994): Court found Section 2 of the Voting Rights Act was violated by State legislature districting plan adopted in 1992.
 - Bloc-voting white majority consistently defeated candidates supported by the lower Shore’s politically cohesive, geographically compact black community.
 - Plan adopted “cracked” cohesive black community between two districts, submerging them in majority-white districts
 - Blacks had less opportunity to participate in the political process and elect candidates of their choice – in 200 years, had not elected black representative.
 - Court required submission of plan that complied with Section 2 – that created majority-minority district on the Eastern Shore.

In the revised plan, the total population deviation was 14.8%, but since the deviation was due to the creation of the majority-minority district on the Eastern Shore, it was deemed permissible by the court. 849 F.Supp. 1072, 1075 (1994).

Case: Voting Rights Act – Section 2 Violation Found

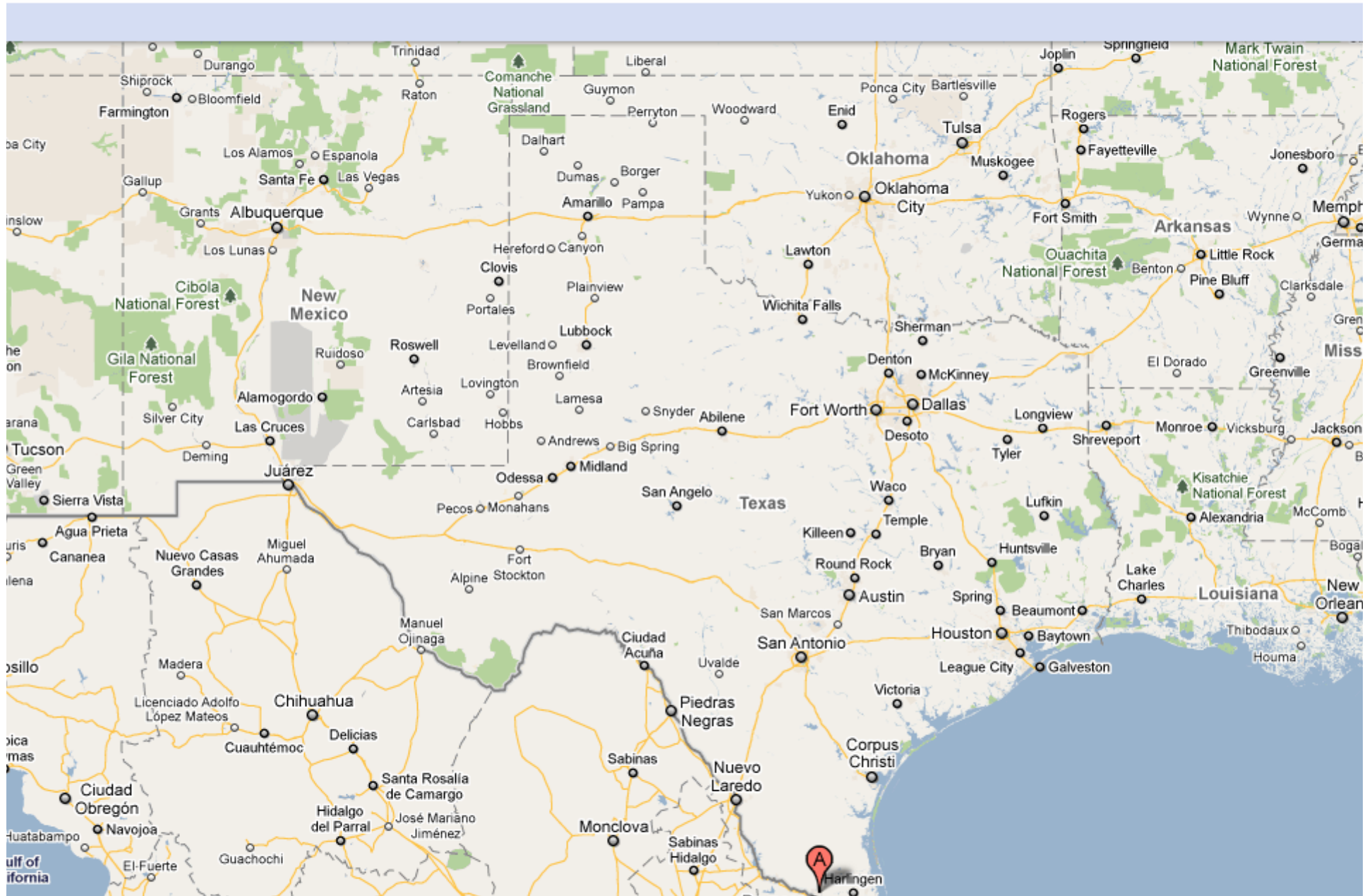


League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006).

Section 2 violation existed where State broke apart a majority-minority Latino district to protect an incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district.

State purported to compensate by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest.

Did not meet compact requirement of Section 2 and did not remedy Section 2 violation in original, cracked district.



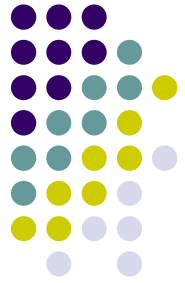
Case: Voting Rights Act – Section 2 Violation Not Found



- *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004): Plaintiffs could not establish black voters were denied an equal opportunity to elect candidate of their choice when redistricting plan reduced voting-age population of blacks in their district from 37.8% to 32.3%.
 - Plaintiffs “could only form a minority of the voters in the Fourth District even before the Plan’s enactment, the ability to elect candidates of their own choice was never within plaintiffs’ grasp.” at 430.
 - Black voters had no less opportunity in comparison to other voters of similar strength to elect a candidate of their choice.
 - Fourth Circuit found Section 2 did not protect a coalition or crossover district.

Case: Voting Rights Act –

Section 2: Violation Not Found



- ***League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).**
Court rejected challenge to district around Dallas area of Texas, where blacks had constituted 25% of population in district. Plaintiffs alleged changed district diluted their influence.
 - Even if voted as a block they could at best influence the election; recognizing such a claim would extend scope of Section 2 and inject race into every redistricting plan.
 - Section 2 of Voting Rights Act did not require the creation of influence district.
 - Plurality decision.
- ***Bartlett v. Strickland*, 556 U.S. ___, 129 S.Ct. 1231 (2009).**
 - Court found a minority group must constitute a *numerical majority* in a compact geographical area in order for Section 2 to require a legislative district to be created or protected to prevent dilution of voting strength.
 - Does not apply to cases in which there is intentional discrimination against a minority.
 - Plurality decision.



1) In your opinion would it be a violation of the voting rights act to retain something close to the 2010 racial distribution for new County Council Districts?

Your answer might note that the Council has elected minority races in the past and there is no evidence of whites voting in a block.

**Council Districts by Hispanic & Race Combined:
Montgomery County, Maryland**

| Council Districts ¹ | Population | Hispanic | Not Hispanic | | | | Minority |
|--------------------------------|------------|----------|--------------|---------|---------|--------|----------|
| | | | White | Black | Asian | Other | |
| District 1 | 185,462 | 13,869 | 136,048 | 7,887 | 22,339 | 5,319 | 49,414 |
| District 2 | 214,315 | 33,525 | 105,620 | 36,422 | 31,572 | 7,176 | 108,695 |
| District 3 | 197,661 | 35,775 | 90,648 | 23,757 | 40,972 | 6,509 | 107,013 |
| District 4 | 189,652 | 35,152 | 75,076 | 48,342 | 25,084 | 5,998 | 114,576 |
| District 5 | 184,687 | 47,077 | 71,373 | 45,281 | 15,137 | 5,819 | 113,314 |
| County Total | 971,777 | 165,398 | 478,765 | 161,689 | 135,104 | 30,821 | 493,012 |
| Percent of County Total | | | | | | | |
| District 1 | 19.1% | 8.4% | 28.4% | 4.9% | 16.5% | 17.3% | 10.0% |
| District 2 | 22.1% | 20.3% | 22.1% | 22.5% | 23.4% | 23.3% | 22.0% |
| District 3 | 20.3% | 21.6% | 18.9% | 14.7% | 30.3% | 21.1% | 21.7% |
| District 4 | 19.5% | 21.3% | 15.7% | 29.9% | 18.6% | 19.5% | 23.2% |
| District 5 | 19.0% | 28.5% | 14.9% | 28.0% | 11.2% | 18.9% | 23.0% |
| County Total | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% | 100.0% |
| County percent | | 17.0% | 49.3% | 16.6% | 13.9% | 3.2% | 50.7% |

2) Are there legal problems to using voting behavior (voting records by party affiliation) as a formal criteria for redistricting?

REDISTRICTING ENSURES EVERY PERSON HAS A VOICE:



- No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.

Reynolds v. Sims, 377 U.S. 533, 560 (1964).

- The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.

Gray v. Sanders, 372 U.S. 368, 379 (1963).